Supreme Court, U.S.
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No. 91-895

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

TALMADGE W. HAYES,
Petitioner,

v.

COMMUNITY GENERAL OSTEOPATHIC HOSPITAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENT COMMUNITY GENERAL OSTEOPATHIC HOSPITAL IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should *certiorari* be granted on whether *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), precludes a discriminatory discharge action premised upon 42 U.S.C. § 1981 given that all courts of appeals considering the issue are in agreement that such a claim is precluded?

2. Is there any special and important reason for granting *certiorari* regarding Petitioner's evidentiary issue given that the appellate court independently determined that substantial evidence supported each of the district court's critical findings of fact and conclusions of law?

PARTIES BELOW

Petitioner Talmadge W. Hayes was the plaintiff in the district court and the appellant in the court of appeals. Respondent Community General Osteopathic Hospital was the defendant in the distict court and appellee in the court of appeals.

The Community Osteopathic Hospital Foundation is the parent corporation of Respondent. The Community Osteopathic Hospital Foundation has two other subsidiaries: Londonderry Properties, Inc. and Arlington Services, Inc.

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BRIEF OF RESPONDENT COMMUNITY GENERAL OSTEOPATHIC HOSPITAL IN OPPOSITION

Respondent Community General Osteopathic Hospital respectfully requests that the Court deny the Petition for Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on August 8, 1991.

COUNTERSTATEMENT OF THE CASE

Petitioner Talmadge W. Hayes ("Hayes" or "Petitioner") was employed by Respondent Community General Osteopathic Hospital ("CGOH") as a Purchasing Manager until May 16, 1988, when he was discharged for lying to his supervisor. Hayes then filed his Complaint

on November 8, 1989. The Complaint alleged that Hayes was discriminatorily discharged because of his race and that he was denied an internal grievance hearing on the same basis as that provided to Caucasians. These allegations were premised on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and 42 U.S.C. § 1981 (1982).

CGOH moved to dismiss the Section 1981 allegations on the ground that the alleged conduct did not relate to Hayes' right to make or enforce contracts within the meaning of that statute. The district court then dismissed the discharge claim under Section 1981 but permitted Hayes to proceed on the internal grievance hearing theory. Once discovery was completed, CGOH moved for partial summary judgment on the internal grievance hearing theory and to strike Hayes' jury demand. The district court granted those motions on September 26, 1990. The order striking the jury demand and internal grievance hearing theory has not been appealed.

On October 1 and 2, 1990, a bench trial with an advisory jury was held on the discriminatory discharge count raised under Title VII. The district court held, on October 26, 1990, that Hayes had failed to prove race discrimination by a preponderance of the evidence and entered judgment in favor of CGOH.

On appeal, the Court of Appeals for the Third Circuit affirmed in all respects. The appellate court held that, in light of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and the holdings of ten other courts of appeals, a claim of discriminatory discharge was not cognizable under Section 1981. The Third Circuit also held that the almost verbatim adoption of CGOH's proposed findings of fact did not require a heightened scrutiny; that the clearly erroneous standard was appropriate; and that the district court's findings of fact were supported, with one exception, by substantial evidence on the record. Significantly, the appellate court correctly concluded that the only

clearly erroneous finding of fact constituted harmless error because of a distinct credibility finding adverse to Petitioner.

SUMMARY OF REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the Third Circuit and district court correctly applied the law governing Section 1981 as it relates to discharges, and the Third Circuit correctly applied the standard of review applicable to a district court's factual findings. Moreover, there are no compelling or important reasons for granting *certiorari*, as this case turns on its own facts and is of importance only to the litigants. The Petition seeks only to have the Court review evidence previously presented and to revisit well-settled principles of law. Such a request does not warrant the exercise of the Court's discretionary power of review.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE LAW CONCERNING THE APPLICATION OF SECTION 1981 TO AN ALLEGEDLY DISCRIMINATORY DISCHARGE IS WELL SETTLED.

A petition for a writ of certiorari should be granted only if there are "special and important reasons therefore." Sup. Ct. R. 10.1. None of the indicia for granting *certiorari* are present in the instant matter. With regard to the first issue Petitioner advances, there is no conflict among the courts of appeals, *see* Sup. Ct. R. 10.1(a), and the applicable law has been settled since the Court decided *Patterson*.

The relevant statute at issue here is 42 U.S.C. § 1981. This statute provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be

> parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by White citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

In *Patterson*, the Court held "that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." 491 U.S. at 171. In the opinion below, the Third Circuit correctly noted that *Patterson* did not address specifically whether an allegedly discriminatory discharge continued to be cognizable under Section 1981. However, the appellate court found "*Patterson's* direction clear and [held] that such discharge is not actionable under § 1981. Like on-the-job harassment, job termination is clearly 'post-formation conduct' implicating performance of an existing employment contract, but not formation of such a contract." *Hayes v. Community General Osteopathic Hospital*, 940 F.2d 54, 56 (3d Cir. 1991) (citations and footnote omitted). Accordingly, the appellate court affirmed the district court's dismissal of Petitioner's Section 1981 allegations.

Since the *Patterson* decision, the Courts of Appeals for the District of Columbia,[1] the Second,[2] Fourth,[3] Fifth,[4]

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[1] *See Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1571 (D.C. Cir. 1991), *petition for cert. filed* (Nov. 1, 1991) (No. 91-724).

[2] *See Patterson v. Intercoast Management of Hartford, Inc.*, 918 F.2d 12, 13-14 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1686 (1991).

[3] *See Williams v. First Union National Bank*, 920 F.2d 232, 233-34 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2259 (1991).

[4] *See Carter v. South Central Bell*, 912 F.2d 832, 839 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991).

Sixth,[5] Seventh,[6] Eighth,[7] Ninth,[8] Tenth,[9] and Eleventh[10] Circuits all have held that an allegedly discriminatory discharge does not constitute the making or enforcement of a contract within the meaning of Section 1981.[11] The decisions of the Court of Appeals for the Third Circuit and district court in this case are in accord with this now long line of cases.

Thus, the law is not unsettled and there are no "special and important reasons" for the Court to exercise its discretionary power of review. Accordingly, CGOH respectfully requests the Court to deny the Petition on this ground.

II. THE APPLICATION OF THE "CLEARLY ERRONEOUS" STANDARD TO THE DISTRICT COURT'S FINDINGS OF FACT IS OF IMPORTANCE ONLY TO THESE LITIGANTS AND IS IN ACCORD WITH APPLICABLE PRECEDENT.

The remaining issue in the instant Petition constitutes a simple case of a disappointed litigant's differential view

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[5] *See Prather v. Dayton Power and Light Co.*, 918 F.2d 1255, 1256-58 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991).

[6] *See McKnight v. General Motors Corp.*, 908 F.2d 104, 108-10 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991).

[7] *See Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991).

[8] *See Courtney v. Canyon Television and Appliance Rental, Inc.*, 899 F.2d 845, 949 (9th Cir. 1990).

[9] *See Trujillo v. Grand Junction Regional Center*, 928 F.2d 973, 976 (10th Cir. 1991).

[10] *See Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1520 (11th Cir. 1991).

[11] The Court of Appeals for the First Circuit has not yet ruled on this issue, and declined to reach the question in the somewhat analogous context of a university's suspension of a student. *See Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16-17 (1st Cir. 1989).

of adverse findings. Despite Hayes' protestations to the contrary, there is no doubt that the clearly erroneous standard applies to the factual findings of a district court.

Rule 52 of the Federal Rules of Civil Procedure specifies:

> *In all actions tried upon the facts* without a jury or *with an advisory jury*, the court shall find the facts specially and state separately its conclusions of law thereon . . . . *Findings of fact*, whether based on oral or documentary evidence, *shall not be set aside unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

(emphasis added). The unambiguous language of the Rule indicates that the Third Circuit was entirely correct in applying the clearly erroneous standard on appeal.

In effect, Hayes' contrary arguments are a *non sequitur*. Here, the court of appeals held that "[s]ubstantial evidence in the record" supported the conclusions of the district court. 940 F.2d at 58. Consequently, there simply was no basis for reversing the findings and conclusions of the district court.

In sum, Petitioner's contentions raise no substantial legal question. An advisory jury is just that and nothing more. A district court may accept or reject an advisory jury's recommendation. *See Hyde Properties v. McCoy*, 507 F.2d 301 (6th Cir. 1974); *Sheila's Shine Products, Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 122 (5th Cir. 1973); *Chicago & Northwestern Ry. Co. v. Minnesota Transfer Ry. Co.*, 371 F.2d 129, 130 (8th Cir. 1967). Accordingly, the fact that a district court rejects the recommendations of an advisory jury does change the applicable standard of review. As the Third Circuit correctly concluded, the district court's findings of fact and conclusions of law are reviewed under the clearly erroneous standard. *See Marvel v. United States*, 719 F.2d

1507, 1515 (10th Cir. 1983); *Interstate Commerce Comm'n v. Southwest Marketing Ass'n*, 315 F. Supp. 805 (N.D. Tex. 1970); Fed. R. Civ. P. 52(a). By arguing for a heightened standard of review and ignoring that each critical finding was supported by substantial evidence of record, Hayes virtually concedes that the district court's findings were not clearly erroneous and should be upheld on appeal.

Similarly, the court of appeals correctly held that the adoption by the district court of CGOH's proposed findings of fact does not warrant heightened scrutiny on appeal. In *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985), the Court stated that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." The same conclusion was reached in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), where the district court adopted verbatim appellees' findings and conclusions. There, the Court held: "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by the evidence." 376 U.S. at 656.

In the matter at hand, the court of appeals specifically found that the district court's decision was supported by substantial evidence in the record and passed muster under the clearly erroneous standard. Indeed, the fact that the district court disagreed with the findings of the advisory jury is persuasive evidence that the district court thoroughly considered the evidence and the credibility of witnesses.

Undeterred, Hayes maintains that the Third Circuit erred in its conclusion that it was harmless error for the district court to find that Hayes had not challenged CGOH's Vice President of Human Resource's testimony that Hayes had admitted lying concerning the reason for his absence. *See* 940 F.2d at 57-58. In essence, Peti-

tioner is asking the Court to re-examine the district court's credibility findings. As the Third Circuit found, "the district court made a distinct, specific finding that [CGOH]'s Vice President of Human Resources 'testified truthfully' that Hayes admitted lying to his supervisor." 940 F.2d at 58; *see also* Finding of Fact No. 31. Whether Hayes challenged that testimony, the district court, nevertheless, made a credibility finding that rejected his challenge. Clearly then, this issue does not implicate disputed legal principles.

Under *Anderson* and Rule 52, the district court's decision to credit the testimony of the Vice President should only be reviewed for clear error. *See Anderson*, 470 U.S. at 573; Fed. R. Civ. P. 52(a). The court of appeals was entirely correct in refusing to re-weigh the evidence supporting this conclusion because "[t]he reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson*, 470 U.S. at 573. For the Third Circuit to reverse a credibility finding which was otherwise supported by the record, *see* 940 F.2d at 58, would be to overstep the bounds of appellate review clearly drawn by *Anderson*.

Reviewing the quantum and quality of the evidence supporting Hayes' dismissal was the responsibility of the district court particularly where, as here, the underlying question focused on discriminatory intent. Indeed, the Court has traditionally accorded great deference to findings regarding discriminatory intent. *See Hernandez v. New York*, 111 S. Ct. 1859, 1868 (1991) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) and *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986)).

While Hayes argues that the district court could have somehow performed a more thorough job, this assertion does not provide a basis for granting *certiorari*. As the Court consistently has held, it does not "grant a certiorari to review evidence and discuss specific facts." *United*

States v. Johnston, 268 U.S. 220, 227 (1925). Simply stated, the evidentiary issue presented here is of importance solely to the litigants in this case. There are no special or important reasons favoring an exercise of the Court's discretionary power of review for this singular purpose. In short, the Court does not sit "for the benefit of [this] particular litigant[]." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the Petition should be denied.

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